IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT REVAK and MARGARET REVAK	:	
	:	CIVIL ACTION
v.	:	
	:	No. 03-4822
INTERFOREST TERMINAL UMEA AB and WAGENBORG SHIPPING, B.V.	:	

SURRICK, J. **SEPTEMBER 9, 2009**

MEMORANDUM

Presently before the Court is Plaintiffs' Motion *in Limine* to Preclude Opinion Testimony of Defendants' Liability Expert, David P. Pope, Ph.D. (Doc. No. 66.) For the following reasons, Plaintiffs' Motion will be granted in part and denied in part.

I. BACKGROUND

On September 8, 2009, Plaintiff Robert Revak ("Revak") was injured at his job as a longshoreman at the Port of Philadelphia when a draft of timber that was being unloaded from a cargo ship fell on him. At the time of the accident, the cargo ship, the *Morraborg*, was owned and operated by Wagenborg Shipping, B.V., and had arrived in Philadelphia from Holmsund, Sweden. Interforest Terminal UMEA AB, a professional stevedore company, had loaded the timber onto the *Morraborg* in Holmsund. Before being loaded onto the *Morraborg*, the timber had been organized into drafts made up of four or five 1100 pound packages of timber. Interforest used polyester slings to move the drafts by placing a sling under each draft and then attaching the sling to the hook of a cargo crane. The slings remained under the drafts while the *Morraborg* was in transit to Philadelphia. J&H Stevedoring Company, Revak's employer, used

the slings to unload the drafts. It is undisputed that the failure of one of the slings as the *Morraborg* was being unloaded caused the accident that led to Revak's injury.

Revak and his wife, Margaret Revak, brought this suit against Wagenborg under Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), and against Interforest based upon the breach of the duty of care to Revak under the general maritime law. In May 2009, we denied motions for summary judgment filed by Wagenborg and Interforest. *Revak v. Interforest Terminal UMEA AB*, No. 03-4822, 2009 U.S. Dist. LEXIS 75621, at *1 (E.D. Pa. May 19, 2009) (denying Interforest's motion for summary judgment); *Revak v. Interforest Terminal UMEA AB*, No. 03-4822, 2009 U.S. Dist. LEXIS 41249, at *1 (E.D. Pa. May 14, 2009) (denying Wagenborg's motion for summary judgment). Wagenborg was dismissed from the case by stipulation. (*See* Doc. Nos. 74, 81.) Interforest is the sole remaining Defendant, and trial is scheduled for September 14, 2009.

Interforest has retained David P. Pope, Ph.D., to provide an expert opinion on what caused the sling to break. Dr. Pope is a professor in the Department of Materials Science and Engineering at the University of Pennsylvania. (Doc. No. 70-4 at 7.) His expert report states, in pertinent part:

> I conclude the following with a reasonable degree of engineering certainty: The subject sling was damaged and its load bearing capacity was reduced by at least 80% while the draft was being lifted from the ship in Philadelphia. The remaining segment of the damaged sling could just carry the dead load of the draft, but a small increase in the load, as caused by moving the load as it was being positioned above the dock, was sufficient to break that remaining small segment. There is no evidence that the sling was damaged to the point of being unsafe prior to the final lift in Philadelphia, rather, the damage leading to the failure was introduced during this final lift. It is also likely that the label was torn from the sling by this same event.

("Pope Report," Doc. No. 66-1 at 3.) Dr. Pope bases his opinion on an examination of the sling,

the allegations in the Second Amended Complaint, a series of photographs (which are not specifically identified), the depositions of Revak and several potential witnesses, and the report of Plaintiffs' expert, Robert A. Erb, Ph.D. (Pope Report at 1.) The substance of Dr. Pope's opinion is that the damage that caused the sling to break was so severe that "it is highly unlikely that [the sling] could have withstood the forces required to lift the draft from the ship." (*Id.* at 3.) In other words, the sling had to have been damaged during the lift. Dr. Pope believes that "the draft pinched the sling against a portion of the ship while it was being lifted from the ship in Philadelphia." (*Id.*)

II. LEGAL STANDARD

Federal Rule of Evidence 702 governs the admissibility of testimony by experts and embodies a "'strong and undeniable preference for admitting any evidence having some potential for assisting the trier of fact . . . .'"[1] *United States v. Velasquez*, 64 F.3d 844, 849 (3d Cir. 1995) (quoting *DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 956 (3d Cir. 1990)). As the Supreme Court noted in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." 509 U.S. 579, 595 (1993) (citations omitted); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (holding that *Daubert* applies not only to scientific knowledge, but also to testimony based on technical and other specialized knowledge). In order to address the concerns raised by

[1] Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

the Supreme Court in *Daubert*, the Rule contains a "trilogy" of requirements: "qualification, reliability and fit." *Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003). The trial judge serves as a gatekeeper who ensures that the trilogy of requirements is satisfied – "that any and all expert testimony or evidence is not only relevant but also reliable." *Kannankeril v. Terminix Int'l*, 128 F.3d 802, 805 (3d Cir. 1997) (citing *Daubert*, 509 U.S. 579, 589 (1993)).

Plaintiffs do not challenge Dr. Pope's qualifications. They do challenge both the reliability and fit of his proposed testimony. An expert's testimony satisfies Rule 702's reliability requirement if it is "based on the methods and procedures of science rather than on subjective belief or unsupported speculation." *In re Paoli R.R. PCB Litig.*, 35 F.3d 717, 741-43 (3d Cir. 1994). The reliability requirement is "lower than the merits standard of correctness." *Id.* at 744; *see also In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999) (stating that "the standard for determining reliability is not that high"). The Third Circuit has provided a list of factors for trial judges to consider when evaluating the reliability of expert testimony:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Pineda v. Ford Motor Co., 520 F.3d 237, 247-48 (3d Cir. 2008) (citing *Paoli*, 35 F.3d at 742 n.8). These factors are "'neither exhaustive nor applicable in every case.'" *Id.* at 248 (quoting *Kannankeril*, 128 F.3d at 806-07 and citing *Kumho Tire*, 526 U.S. at 151).

In assessing whether an expert's proposed testimony satisfies the fit requirement, the court must inquire into whether the testimony is "relevant for the purposes of the case and . . .

[will] assist the trier of fact." *Schneider*, 320 F.3d at 404. The standard is "not that high," but is "higher than bare relevance." *In re Paoli*, 35 F.3d at 745. Fit requires experts' opinions to "be predicated on a reliable methodology." *United States v. Ford*, 481 F.3d 215, 220 n.6 (3d Cir. 2007). In order to satisfy this standard, experts must "apply principles or methods to the facts of the case and produce conclusions that have a debatable connection to the question in issue." *Id.*

III. ANALYSIS

Plaintiffs seek to preclude Dr. Pope from testifying because his report "(1) . . . is not based upon sufficient facts or data and (2) it is not the product of reliable principles and methods." (Doc. No. 66-2 at 10-11.) Specifically, Plaintiffs contend that Dr. Pope's conclusion that the sling was damaged during the lift by being pinched against a portion of the ship is a bare assertion that is unsupported by the record. (*Id.* at 13.) To support this position, Plaintiffs cite the deposition testimony of witnesses who state that they saw no contact between the draft and the ship. (*Id.*) Plaintiffs argue that Dr. Pope's testimony has no factual basis and should be precluded. Plaintiffs also contend that Dr. Pope's conclusion that "it is . . . likely that the label was torn from the sling" during the final lift is speculative and "fails any test of 'reliability.'" (*Id.* at 14.) Interforest responds that Dr. Pope's conclusions are supported by more than sufficient facts. (Doc. No. 70-3 at 8.) Interforest contends that Plaintiffs' arguments go to the weight of Dr. Pope's testimony and not its admissibility.

We conclude that Dr. Pope's opinion regarding the nature of the damage to the sling is reliable and relevant. This is not a case where the design of the sling is at issue; rather, this case turns on the condition of the particular sling involved in the accident. Thus, a tactile and visual review by an experienced expert would be great importance. *See, e.g.*, *Yarchak v. Trek Bicycle*

Corp., 208 F. Supp. 2d 470, 501 (D.N.J. 2002) ("[A]n expert opinion based exclusively on a 'visual or tactile inspection' or 'skill or experienced-based observation' may . . . satisfy Rule 702's threshold of evidentiary reliability." (quoting *Khumo Tire*, 525 U.S. at 150)). Dr. Pope's tactile and visual review of the sling led him to conclude that if "the sling was so severely damaged prior to the accident . . . [then] it is highly unlikely that it could have withstood the forces required to lift the draft out of the ship" before it failed. (Pope Report at 3.) Given the nature of this case, Dr. Pope's methodology is sound: his review of the sling provided him with a factual foundation to reach his conclusion. Indeed, Dr. Pope employed the same methodology as Plaintiffs' expert, Dr. Erb. (*See* "Erb Report," Doc. No. 66-5 at 4-5.) Based on his review of the sling, Dr. Erb concluded that "[t]he defect that led to the failure could have been detected by a proper visual inspection prior to the accident." (*Id.* at 7.) Dr. Erb's use of substantially the same methodology as Dr. Pope provides further support to a determination that Dr. Pope's testimony is reliable. *See Correa v. Cruisers, A Division of KCS Int'l, Inc.*, 298 F.3d 13, 26 (1st Cir. 2002) ("Acceptance of the methodology by the other party's expert may give additional credence to the reliability of the proffered testimony."); *see also Kumho Tire*, 526 U.S. at 151 (noting that "whether . . . a method is generally accepted in the relevant engineering community" may be a relevant question to ask when conducting a Rule 702 analysis).

Plaintiffs point to the fact that Dr. Pope did not discuss the testimony of witnesses who stated that the sling did not come into contact with the ship during the lift as evidence that Dr. Pope's report is not reliable. (*See* Doc. No. 66-2 at 5-9, 13.) Even though the deposition testimony of these witnesses regarding the accident appears to contradict Dr. Pope's opinion, the

effect of their testimony depends on credibility determinations by the jury. This testimony does not render Dr. Pope's opinion unreliable.

Plaintiffs are essentially dissatisfied with the conclusion reached by Dr. Pope after his inspection of the sling. However, dissatisfaction with an expert's conclusion does not raise issues about the reliability or relevance of his opinion. Plaintiffs' arguments do not persuade us that Dr. Pope is "outside the range where experts might reasonably differ, and where the jury must decide among conflicting views of different expert, even though the evidence is 'shaky.'" *Kumho Tire*, 526 U.S. at 153 (quoting *Daubert*, 509 U.S. at 596). We are satisfied that Plaintiffs' arguments go to Dr. Pope's credibility and the weight the jury should accord his testimony, not to the admissibility of his testimony. Accordingly, we will not exclude Dr. Pope's opinion regarding the damage to the sling.

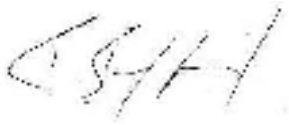
We do, however, find problematic Dr. Pope's opinion that "[i]t is . . . likely that the label was torn from the sling by" the event that damaged the sling. (*See* Pope Report at 3.) This appears to be sheer speculation. A review of Dr. Pope's report provides no factual basis for this claim. Dr. Pope does not explain how his examination of the sling justifies concluding that the label must have been torn from the sling during the lift. Such speculative expert testimony is not admissible under Rule 702. *See, e.g,, Schneider*, 320 F.3d at 404 (stating that expert testimony must not be based on "'subjective belief or unsupported speculation'" (quoting *In re Paoli*, 35 F.3d at 742)). Accordingly, Dr. Pope is precluded from offering an opinion regarding how the label came to be separated from the sling.

III. CONCLUSION

For these reasons, Plaintiffs' Motion *in Limine* to Preclude Dr. Pope's Opinion Testimony will be granted in part and denied in part.

An appropriate Order will follow.

BY THE COURT:



R. Barclay Surrick, J.

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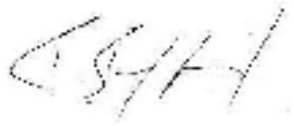
ORDER

AND NOW, this 9th day of September, 2009, upon consideration of Plaintiffs' Motion *in Limine* to Preclude Opinion Testimony of Defendants' Liability Expert, David P. Pope, Ph.D. (Doc. No. 66), and all documents submitted in support thereof and in opposition thereto, it is ORDERED that the Motion is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

BY THE COURT:



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